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Karasek v. Regents of the University of California, No. 15-cv-03717-WHO, 2015 WL 8527338 (N.D. Cal. Dec. 11, 2015): The Victimization of Title IX

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Note*

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> In recent weeks, all around the country, parents dropped their children off at college. They're worrying about whether they'll make friends, how they'll do in their classes, if they'll be happy. And in the back of every parent's mind, they're also worrying, "Will my daughter be alright?" They may not know the statistics: that one in five women will be sexually assaulted during her college career. One in five. And for transgender and bisexual women, it's even worse: one in four transgender students experience sexual assault in college. For bisexual students, it's one in three. They may not know those statistics, but deep down, they know.
>
> It's inexcusable. It's unacceptable. It has to stop.[1]

I. INTRODUCTION

There is a problem throughout America's college campuses: the grave mishandling of sexual assault investigations. In one study, thirty percent of male college students "admitted they would commit rape if they were sure they could get away with it. This figure jumped to 58% when the wording of the question was changed from 'commit rape' to 'force a woman to have sex.'"[2]

A span of recent, highly publicized cases of college sexual assaults has led to a national outrage, not just at the perpetrators of the assaults but at the criminal justice system and its participants, the universities and administrators, and the highly prevalent rape culture that normalizes sexual violence.[3] Many cases have sparked conversation around legislative change, such as the controversial Stanford sexual assault case, where twenty-year-old, Olympic-hopeful swimmer Brock Turner was released after serving half of his six-month jail sentence[4] for the rape of an unconscious Jane Doe behind a dumpster after a fraternity party.[5] The outrage after the lenient sentence of Brock Turner led California policy makers to amend the state's sexual assault statutes, which previously created a legal loophole for offenders whose victims were intoxicated or unconscious.[6]

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1. Joe Biden (@joebiden), FACEBOOK (Sept. 7, 2017, 11:55 PM), https://www.facebook.com/joebiden/posts/10154652583601104 [http://perma.unl.edu/ZL5H-8BA2].
2. Alana Prochuk, *Rape Culture Is Real—And Yes, We've Had Enough*, WOMEN AGAINST VIOLENCE AGAINST WOMEN (Apr. 18, 2013), http://www.wavaw.ca/rape-culture-is-real-and-yes-weve-had-enough [http://perma.unl.edu/PE4H-H8VB].
3. *E.g.*, *id.*
4. Erik Ortiz, *Brock Turner, Convicted of Sexual Assault, Set for Early Release—What's Next in Case?,* NBC NEWS (Sept. 1, 2016), http://www.nbcnews.com/news/us-news/brock-turner-convicted-sexual-assault-set-early-release-what-s-n640366 [http://perma.unl.edu/XP3G-X9KG]. Brock Turner faced up to a fourteen-year prison sentence for his conviction. *Id.*
5. Thomas Fuller, *Court Papers Give Insight Into Stanford Sex Assault*, N.Y. TIMES, June 12, 2016, at A8, http://www.nytimes.com/2016/06/13/us/brock-turner-stanford-rape.html.
6. Since offenders convicted of rape of an intoxicated or unconscious victim technically did not use "force" under the statute, the offenders were given more lenient sentences than those convicted of rape using additional physical force. Matt Ford, *How Brock Turner Changed California's Rape Laws*, ATLANTIC (Oct. 1, 2016),

This debate reaches much further than states' sexual assault statutes and the criminal justice system, and has become an issue of what universities should be doing, if anything, to protect their students. Some argue that universities should leave these matters to the criminal justice system.[7] But others are steadfast that administrative processes are not only necessary to increase campus safety but are required by law.[8]

College campuses provide a unique setting for sexual violence, where it is common and even traditional to witness overt displays of sexual violence.[9] Students are exposed to conduct such as "rape chants" by fraternity members shouting "No means yes, yes means anal!"[10] or banners displaying sayings like "she called you daddy for 18 yrs, now it's our turn" and "Rowdy and fun. Hope your baby girl is ready for a good time."[11]

One in five women and one in sixteen men are sexually assaulted while attending college.[12] However, more than ninety percent of sex-

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http://www.theatlantic.com/news/archive/2016/10/california-law-brock-turner/502562 [http://perma.unl.edu/Y3F2-4L38].

7. *See* Samantha Harris, *Law Enforcement Must Take the Lead in Campus Sexual Assault Cases*, N.Y. TIMES (Aug. 13, 2014), http://www.nytimes.com/roomfordebate/2014/08/12/doing-enough-to-prevent-rape-on-campus/law-enforcement-must-take-the-lead-in-campus-sexual-assault-cases [http://perma.unl.edu/5B4H-RXDQ].

8. *See* Holly Rider-Milkovich, *Campuses Are the Best Places for Sexual Assault Accountability*, N.Y. TIMES (Aug. 12, 2014), http://www.nytimes.com/roomfordebate/2014/08/12/doing-enough-to-prevent-rape-on-campus/campuses-are-the-best-places-for-sexual-assault-accountability [http://perma.unl.edu/2ERL-JY4G]. *See generally* Lauren P. Schroeder, Comment, *Cracks in the Ivory Tower: How the Campus Sexual Violence Elimination Act Can Protect Students from Sexual Assault*, 45 LOY. U. CHI. L.J. 1195 (2014).

9. "Sexual violence" refers to:

> physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent. . . . . A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. . . . All such acts of sexual violence are forms of sex discrimination prohibited by Title IX.

OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 1 (2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [http://perma.unl.edu/DBH9-SH8N].

10. Andrew Bretz, *Making an Impact?: Feminist Pedagogy and Rape Culture on University Campuses*, 40 ENG. STUD. IN CAN. 17, 17 (2014); Tracy Clark-Flory, *Yale Fraternity Pledges Chant About Rape*, SALON (Oct. 15, 2010), http://www.salon.com/2010/10/15/yale_fraternity_pledges_chant_about_rape [http://perma.unl.edu/3XBW-ZTTC].

11. Tom McKay, *These Disturbing "First Day of School" Banners Reveal Fraternity Rape Culture at Its Worst*, MIC (Aug. 24, 2015), https://mic.com/articles/124331/these-disturbing-first-day-of-school-banners-reveal-fraternity-rape-culture-at-its-worst#.8dapaUEHD [http://perma.unl.edu/RUD5-SD6Y].

12. NAT'L SEXUAL VIOLENCE RESEARCH CTR., STATISTICS ABOUT SEXUAL VIOLENCE 2 (2015), http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf [http://perma.unl.edu/BST3-

ual assault victims on college campuses do not report the assault,[13] which is higher than the national average of between sixty-six and seventy-four percent of sexual assaults going unreported.[14] Nationally, rape is one of the most underreported crimes.[15] There are many explanations for the low reporting rates of college sexual assaults, with the most common being knowing the assailant, fear and shame, uncertainty that there is sufficient evidence to prove the sexual assault occurred, and fear the assailant will not be punished.[16]

The existence of rape culture on college campuses surpasses student behaviors and seeps into universities' response to sexual-violence reports. A study at the University of Virginia revealed that since 1998, "183 people ha[d] been expelled for honor-code violations like cheating, but none ha[d] been kicked out for sexual assault."[17] This illus-

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AFAT]. Another study conducted by the Association of American Universities surveyed 150,000 students at twenty-seven colleges and found that 27.2% of female college students had experienced some kind of unwanted sexual contact since entering college. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 80–81 (2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf [https://perma.unl.edu/952J-ZLLW]. Yet another survey completed on more than 200,000 students from twenty-one different four-year colleges found that twenty-five percent of the women had been sexually assaulted. Jessie Ford & Paula England, *What Percent of College Women Are Sexually Assaulted in College?,* CONTEXTS (Jan. 12, 2015), https://contexts.org/blog/what-percent-of-college-women-are-sexually-assaulted-in-college [http://perma.unl.edu/FQ9L-MNGQ]. It is important to note these statistics include victims of different types of sexual assaults, including a forced kiss or unwanted touching. *See* Christopher Krebs & Christine Lindquist, *Setting the Record Straight on "1 in 5",* TIME (Dec. 15, 2014), http://time.com/3633903/campus-rape-1-in-5-sexual-assault-setting-record-straight [http://perma.unl.edu/5PQ4-P3BJ].

13. BONNIE S. FISHER ET AL., U.S. DEP'T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN (2000), https://www.ncjrs.gov/pdffiles1/nij/182369.pdf [http://perma.unl.edu/Q2ZL-8AHJ].
14. CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION (2002), https://www.bjs.gov/content/pub/pdf/rsarp00.pdf [http://perma.unl.edu/7T4R-MMSS].
15. W. David Allen, *The Reporting and Underreporting of Rape*, 73 S. ECON. J. 623, 623 (2007); *see also* JENNIFER L. TRUMAN & LYYN LANGTON, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2014 (2015), https://www.bjs.gov/content/pub/pdf/cv14.pdf [http://perma.unl.edu/W2Q6-A6KD] (finding that rape is one of the most underreported crimes).
16. David DeMatteo et al., *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, 21 PSYCHOL. PUB. POL'Y & L. 227, 228 (2015).
17. Eliza Gray, *Fraternity Row*, TIME, Dec. 15, 2014, at 44. A further look into the University's history showed that the school had never expelled a student for sexual assault, even when the student admitted to the assault. Sarah Ganim, *Beyond Rolling Stone Story: How Does UVA Handle Campus Sexual Assault?*, CNN (Apr. 6, 2015), http://www.cnn.com/2015/04/06/us/uva-sexual-assault-investigation [http://perma.unl.edu/44H9-7CH6]. After the controversial Rolling Stone article *A Rape on Campus* was published in November 2014, the University of

trates that universities might be more willing to discipline students if a student plagiarizes a paper than if a student sexually assaults another student. As of June 2016, 195 colleges were under investigation by the U.S. Department of Education for how they handle sexual assault reports.[18]

This Note focuses on the Northern District of California in *Karasek v. Regents of the University of California*,[19] its interpretation of Title IX's "deliberate indifference" standard, and the "further harassment" requirement that some courts have imposed for Title IX sexual harassment claims.[20] Part II provides a social and legal background of Title IX and the possible remedies available to survivors[21] of sexual assault. Part II also provides what is required under the deliberate indifference standard under which Title IX claims are analyzed. Part III sets forth the facts behind *Karasek v. Regents of the University of California*. Part IV argues that the Northern District of California correctly interpreted the further harassment requirement under the deliberate indifference standard in *Karasek* by taking into consideration the purpose of Title IX. Finally, in Part V, this Note concludes that even though the Northern District of California correctly interpreted the further harassment requirement, universities should be held to the standard set forth in the Dear Colleague Letter promulgated by the Department of Education Office for Civil Rights as a matter of public policy.

Virginia has implemented a zero-tolerance policy on sexual assault. *Id.* Rolling Stone retracted the article after many discrepancies about the truth of the incident came to light and was also recently found liable for defamation for the article. T. Rees Shapiro, *Jury Finds Reporter, Rolling Stone Responsible for Defaming U-Va. Dean with Gang Rape Story*, WASH. POST (Nov. 4, 2016), https://www.washingtonpost.com/local/education/jury-finds-reporter-rolling-stone-responsible-for-defaming-u-va-dean-with-gang-rape-story/2016/11/04/aaf407fa-a1e8-11e6-a44d-cc2898cfab06_story.html [http://perma.unl.edu/ZY9F-K6S6].

18. Tyler Kingkade, *There Are Far More Title IX Investigations of Colleges than Most People Know*, HUFFINGTON POST (June 16, 2016), http://www.huffingtonpost.com/entry/title-ix-investigations-sexual-harassment_us_575f4b0ee4b053d433061b3d [http://perma.unl.edu/6PJF-C8K3].

19. Karasek v. Regents of the Univ. of Cal. (*Karasek I*), No. 15-cv-03717-WHO, 2015 WL 8527338 (N.D. Cal. Dec. 11, 2015).

20. Title IX applies to any educational institution that receives federal funding. This Note focuses on higher education institutions.

21. *See* Carol Mosley, *The Language We Use: Victim and Survivor*, WE END VIOLENCE (June 4, 2013), http://www.weendviolence.com/blog/2013/06/04/the-language-we-use-victim-and-survivor [http://perma.unl.edu/G7GE-P5W2]. The term "victim" "contributes to a feeling of powerlessness for those who have been assaulted," while "survivor" exhibits the taking back of their life and moving on, which helps "those who have been assaulted begin to regain the power that was taken from them." *Id.*

II. UNDERSTANDING TITLE IX IN THE CONTEXT OF SEXUAL ASSAULT

Title IX is the federal act that prohibits gender discrimination in education.[22] Title IX was first passed in 1972 to address gender inequality in educational programs. While many people only associate Title IX with school-based athletics, Title IX broadly applies to all educational programs or activities.[23] Title IX has developed significantly since 1972.

Title IX, codified at 20 U.S.C. § 1681, provides in relevant part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[24] Congress authorized an administrative enforcement for Title IX, allowing federal departments or agencies to promulgate rules, regulations, and orders to enforce § 1681.[25] Compliance with these rules, regulations, and orders "may be effected . . . by any . . . means authorized by law," including the termination of federal funding.[26] Title IX provides victims of sex discrimination with a private right of action against recipients of federal education funding.[27] Sexual harassment is a form of discrimination for the purposes of Title IX.[28]

Title IX is "broadly worded," and the U.S. Supreme Court has held that discrimination "covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach."[29] But, schools cannot be held vicariously liable for sexual discrimination committed by teachers or other students.[30]

A. How *Davis v. Monroe County Board of Education* Advanced Title IX

The U.S. Supreme Court first held in *Davis v. Monroe County Board of Education* that student-on-student sexual harassment can amount to harassment under Title IX.[31] But the Court limited its holding so that a school may be liable for monetary damages under

22. 20 U.S.C. § 1681(a) (2012).
23. *Id.*
24. *Id.*
25. 20 U.S.C. § 1682 (2012).
26. *Id.*
27. Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979).
28. Courts analyze Title IX discrimination claims under the same legal framework as Title VII employment discrimination claims. *See, e.g.*, Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 75 (1992); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).
29. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 179 (2005).
30. Escue v. N. Okla. Coll., 450 F.3d 1146, 1152 (10th Cir. 2006).
31. 526 U.S. 629, 640, 646–47 (1999).

Title IX "only for its own misconduct"; that is, the school may be liable only when it "subjects" students to harassment.[32] In *Davis*, a mother brought a Title IX suit against the Board of Education based on the continuous sexual harassment her fifth-grade daughter was subjected to by a male student in the class.[33] The other student consistently made vulgar comments, touched her inappropriately, and displayed sexually suggestive conduct toward the daughter.[34] The mother and the daughter continually reported the incidents to both the teacher and the principal, but the student was never disciplined.[35] The only action taken by the school occurred three months after the harassment began, when the school permitted her to change seats in the classroom so she did not have to sit next to the other student.[36] While the Court of Appeals for the Eleventh Circuit dismissed the plaintiff's complaint because student-on-student harassment did not provide for a private cause of action under Title IX,[37] the Supreme Court reversed, holding Title IX may provide a private right of action for student-on-student harassment when the institution acts with deliberate indifference to known acts of harassment.[38]

The Court delineated a standard for these types of Title IX claims. Under the *Davis* standard, a plaintiff must satisfy five elements. First, the school must have "exercise[d] substantial control over both the harasser and the context in which the . . . harassment occur[ed]."[39] Second, the plaintiff must have suffered harassment "that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the [plaintiff's] educational experience, that the [plaintiff is] effectively denied equal access to an institution's resources and opportunities."[40] Third, the school must have had "'actual knowledge' of the harassment," which is satisfied if a school official "who at a minimum ha[d] authority to address the alleged discrimination and to institute corrective measures on the [school's] behalf ha[d] actual knowledge of [the] discrimination."[41] Fourth, the school must have acted with "deliberate indifference" to the harassment; that is, the school's "response to the harassment or lack thereof [was] clearly unreasonable in light of the known circumstances."[42] Fifth, the school's

32. *Id.* at 640, 644.
33. *Id.* at 632.
34. *Id.* at 633–34.
35. *Id.* at 633–35.
36. *Id.* at 635.
37. *Id.* at 633.
38. *Id.* at 646–47.
39. *Id.* at 645.
40. *Id.* at 650.
41. Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 739 (9th Cir. 2000) (quoting Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998)).
42. *Davis*, 526 U.S. at 648.

deliberate indifference must have "subject[ed] [the plaintiff] to harassment"; that is, the school must have "'cause[d] [the plaintiff] to undergo' harassment or '[made] [the plaintiff] liable or vulnerable' to it."[43]

B. The Deliberate Indifference Standard Under Title IX and How Courts Are Inconsistently Applying What Is Required as "Further Harassment"

The deliberate indifference standard is an "exacting standard,"[44] which requires showing the school was more than just lazy, negligent, or careless.[45] For student-on-student claims, the standard is even higher—it is "exceedingly high."[46] It generally requires the school make "an official decision . . . not to remedy" the discrimination[47] or completely "choose to ignore Title IX's mandate."[48] The school's response must be "clearly unreasonable in light of the known circumstances" and must subject the student to further harassment.[49]

The further harassment requirement under the deliberate indifference standard is a causation requirement, meaning the university's response was a factor in the cause of harm to the plaintiff.[50] Courts, however, have been inconsistent in determining the actual parameters under the further harassment requirement.[51] Some courts have held that further harassment requires the victim be harassed or assaulted a second time, either by the perpetrator or a similarly situated individual, before the school can be liable under Title IX.[52] Under this

43. *Id.* at 644–45 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1996)); *see also Gebser*, 524 U.S. at 277 (adopting the deliberate indifference standard for Title IX harassment).
44. Lopez v. Regents of the Univ. of Cal., 5 F. Supp. 3d 1106, 1122 (N.D. Cal. 2013) (quoting Doe v. Sch. Bd. of Broward Cty., 604 F.3d 1248, 1259 (11th Cir. 2010)).
45. Oden v. N. Marianas Coll., 440 F.3d 1085, 1089 (9th Cir. 2006).
46. Stewart v. Waco Indep. Sch. Dist., 711 F.3d 513, 519–20 (5th Cir.), *vacated and remanded on other grounds*, 599 F. App'x 534 (5th Cir. 2013).
47. *Oden*, 440 F.3d at 1089 (quoting *Gebser*, 524 U.S. at 290).
48. Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1246 (10th Cir. 1999).
49. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 648–49 (1999); *see also* Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282 (11th Cir. 2007) (holding that *Davis* requires that the school's deliberate indifference of the initial discrimination must subject the plaintiff to further discrimination), *superseded by statute on other grounds*, FED. R. CIV. P. 15(a) (amended 2009).
50. Karasek v. Regents of the Univ. of Cal. (*Karasek I*), No. 15-cv-03717-WHO, 2015 WL 8527338, at *9 (N.D. Cal. Dec. 11, 2015).
51. *Compare* Ha v. Nw. Univ., No. 14 C 895, 2014 WL 5893292 (N.D. Ill. Nov. 13, 2014) (subscribing to the idea that further harassment requires subsequent affirmative acts of harassment), *with Williams*, 477 F.3d 1282 (holding the university acted with deliberate indifference when it failed to take precautions to prevent future attacks).
52. *See Ha*, 2014 WL 5893292, at *2 (holding that the knowledge that assailant was still on campus was not sufficient to support a Title IX claim as there were no

view, courts will not find that universities have acted with deliberate indifference as long as there have not been additional acts of harassment by the perpetrator. In *Frazer v. Temple University*, the plaintiff stated in her complaint that her assailant was permitted to remain on campus, would follow her and sit outside her dormitory, followed her to the cafeteria, and "stood directly beside her and stared at her while she was having a conversation with another student."[53] The District Court for the Eastern District of Pennsylvania stated that the assailant's conduct "can be viewed as that of a jilted boyfriend, [and] does not amount to sexual harassment or harassment of any kind that is sufficiently 'severe, pervasive, and objectionably offensive' for liability to attach under *Davis*."[54]

Similarly, in *Ha v. Northwestern University*, the District Court for the Northern District of Illinois concluded that the survivor's "occasional glimpse" of her assailant was not sufficient further harassment to support a Title IX claim, even though knowing he was on campus caused her "considerable grief."[55] The District Court for the Middle District of Tennessee reached the same result in *Thomas v. Meharry Medical College*.[56] Because the survivor did not continue to experience sexual violence after the school received notice, it did not amount to deliberate indifference.[57] This means a plaintiff cannot be successful if there is no harassment after the institution received notice.[58] This requirement is not present in other types of claims which also use the deliberate indifference standard.[59]

Other courts, such as the Court of Appeals for the Eleventh Circuit, have rejected this theory and ruled against universities even

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subsequent acts of harassment); *see also* Frazer v. Temple Univ., 25 F. Supp. 3d 598, 613–14 (E.D. Pa. 2014) (dismissing Title IX claim because plaintiff's claim of subsequent harassment was insufficient to be "severe, pervasive, and objectionably offensive"); Thomas v. Meharry Med. Coll., 1 F. Supp. 3d 816, 827 (M.D. Tenn. 2014) (concluding "there [was] no basis to find" deliberate indifference since there were no allegations of sexual harassment or contact by the perpetrator following the filing of plaintiff's report).

53. 25 F. Supp. 3d at 614.

54. *Id.*

55. 2014 WL 5893292, at *2.

56. 1 F. Supp. 3d at 827.

57. *Id.*

58. See *Frazer*, 25 F. Supp. 3d at 613–14.

59. *See* City of Canton v. Harris, 489 U.S. 378, 392 (1989) (holding a municipality may be liable when its "failure to train reflects deliberate indifference to the constitutional rights of its inhabitants"); *see also* Young v. Choinski, 15 F. Supp. 3d 172, 182 (D. Conn. 2014) (explaining the deliberate indifference standard under Eighth Amendment claims for prisoner's serious medical needs requires showing the danger posed to the prisoner by the indifference was "sufficiently serious" and the prison officials acted with "'deliberate indifference to inmate health or safety' in failing to address [the] danger" (citations omitted)).

without any subsequent contact between the victim and perpetrator.[60] The Eleventh Circuit, in *Williams v. Board of Regents of the University System of Georgia,* analyzed the definition of "subject"[61] to conclude that the University of Georgia's actions were deliberately indifferent which subjected the victim to further discrimination for the purposes of Title IX.[62] The court concluded the University acted with deliberate indifference on three separate occasions:[63] First, when the University failed to inform its student athletes about its sexual harassment policy and failed to adequately supervise the actions of its student athletes, which caused the plaintiff to be the victim of a conspiracy by three basketball players to sexually assault and rape her.[64] Second, by failing to provide an adequate response to the plaintiff's complaint by waiting an additional eight months before conducting a disciplinary hearing, even though the University Police had completed a full report within three months.[65] And, finally, the University acted with deliberate indifference by "effectively denying [the plaintiff] an opportunity to continue to attend [the university]."[66] Even though the plaintiff withdrew from the University immediately after the incident, the University "failed to take any precautions that would prevent future attacks," such as removing the perpetrators from student hous-

60. *See* Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 172 (1st Cir. 2007), *rev'd and remanded on other grounds*, 555 U.S. 246 (2009); Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1296–97 (11th Cir. 2007), *superseded by statute on other grounds*, FED. R. CIV. P. 15(a) (amended 2009); Takla v. Regents of the Univ. of Cal., No. 2:15-cv-04418-CAS(SHx), 2015 WL 6755190, at *5 (C.D. Cal. Nov. 2, 2015) (stating that even without "post-assault harassment by [the assailant], the fact that he and plaintiff attended school together could be found to constitute [sufficient harassment]"); Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438, 444 (D. Conn. 2006) (holding that "even absent actual post-assault harassment" by the perpetrator, the school could be found to be deliberately indifferent); Kelly v. Yale Univ., No. 3:01-CV-1591, 2003 WL 1653424, at *4 (D. Conn. Mar. 26, 2003) (holding on summary judgment that a reasonable jury could find the university ignoring plaintiff's repeated requests for different academic and residential accommodations rendered her "vulnerable" to further harassment by the perpetrator).

61. 477 F.3d at 1296 (noting a definition of "subject" as "to cause to undergo the action of something specified; expose' or 'to make liable or vulnerable; lay open; expose" (citing Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 644–45 (1999))).

62. *Id.* at 1296–97.

63. *Id.* But, it is important to note that the court described the facts in this case as extreme. *Id.* at 1299.

64. *Id.* at 1296. Further, the University was aware that one of the basketball players had a history of serious sexual misconduct but still recruited and admitted him. *Id.* at 1297, 1299.

65. *Id.* at 1296–97. By the time the University conducted its disciplinary hearing, two of the three perpetrators no longer attended the University. *Id.*

66. *Id.* at 1297.

ing, suspending the assailants, or implementing a more protective sexual harassment policy.[67]

The Eleventh Circuit subsequently reaffirmed in *Hill v. Cundiff* that if a university's response to a sexual assault claim is so ineffective it bars the victim's access to educational opportunities, it can amount to deliberate indifference.[68] Under this approach, a university's failure to properly investigate a claim can be acknowledged as deliberate indifference.[69] Merely conducting a minimal investigation to relieve the school of liability, however, is not sufficient.[70]

Further, other courts have held that a university's conduct predating the assault can also amount to deliberate indifference.[71] In *Simpson v. University of Colorado Boulder*, Simpson argued the recruiting program for student athletes was so sexually charged leading up to her assault, it constituted deliberate indifference by the university.[72] Allegedly, the recruits would consistently be promised "a good time" and paired with a female "Ambassador" to be their escort for the weekend.[73] All of this occurred with encouragement and involvement by the football team's head coach, even after several assaults were reported.[74] The court concluded that a reasonable jury could return a verdict for the plaintiffs and denied the university's motion for sum-

67. *Id. But see* Doe v. Bibb Cty. Sch. Dist., 126 F. Supp. 3d 1366, 1381–82 (M.D. Ga. 2015) (recognizing a funding recipient's deficient response that bars a victim's educational opportunity or benefit can constitute "further discrimination," but that is not the case where the perpetrators did not return to the school, the victim testified she did not want to return, and the "school altered its policies on student supervision").

68. 797 F.3d 948, 973–76 (11th Cir. 2015) (reversing the grant of summary judgment to the school, reasoning that a jury could find that the school acted with deliberate indifference with its "clearly unreasonable response" to the sexual assault).

69. Jennings v. Univ. of N.C., 482 F.3d 686, 700–01 (4th Cir. 2007).

70. *See* Vance v. Spencer Cty. Pub. Sch. Dist., 231 F.3d 253, 260–61 (6th Cir. 2000) (stating if the school's argument that doing "something in response to harassment" satisfied the deliberate indifference standard was accurate, the school could get away with "merely investigating and absolutely nothing more"). The court also concluded that continuing to use the same ineffective methods to respond to claims can be viewed as deliberate indifference. *Id.* at 262.

71. *See* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007) (holding a university can be in clear violation of Title IX when it has an official policy that fails to provide adequate training or guidance).

72. *Id.*; *see also* Allison Sherry, *CU Settles Case Stemming from Recruit Scandal*, DENVER POST (Dec. 5, 2007), http://www.denverpost.com/2007/12/05/cu-settles-case-stemming-from-recruit-scandal [http://perma.unl.edu/H6UC-U77D] (reporting on the settlement).

73. *Simpson*, 500 F.3d at 1180.

74. *Id.* at 1183–84 ("[The head coach] claimed that at schools all over the country recruits were shown 'a goodtime,' met young women, and went to parties, and if such activities weren't allowed at CU, it would be a 'competitive disadvantage' for the football team.").

mary judgment.[75] The university then settled with the plaintiffs, awarding $2.5 million to Simpson and $250,000 to the second plaintiff, who was allegedly raped the same night as Simpson.[76]

Still, other courts have used varying lines of reasoning to conclude that deliberate indifference does not require subsequent acts of harassment by the perpetrator. The District Court for the District of Connecticut held that a reasonable jury could find that Yale University was deliberately indifferent after it ignored the plaintiff's numerous requests for different residential and academic accommodations, which led her to withdraw from the university.[77] The court reasoned that even though plaintiff did not suffer further harassment by the perpetrator, "it was her departure from her classes and her dormitory, not any immediate action taken by [the university], that assured the outcome."[78]

Similarly, the same court held in another case that the brief suspension of the perpetrator could suffice as evidence of the school's deliberate indifference because after he returned to the school there was "potential for emotional encounters and harassment."[79] A recent case against the Regents of the University of California also subscribed to this view.[80] The District Court for the Central District of California reasoned that "the phrase, 'make liable and vulnerable' would be redundant if construed to require further harassment."[81] Placing such a strong emphasis on the requirement for further harassment would punish a victim who tries to avoid situations where she might encounter the perpetrator.[82]

III. *KARASEK V. REGENTS OF THE UNIVERSITY OF CALIFORNIA*

Karasek involves the claims of three individuals against the Regents of the University of California, specifically the University of California, Berkeley, under Title IX.[83] All three individuals were sexually assaulted while undergraduate students at the University.[84] The plaintiffs alleged the University responded with deliberate indiffer-

75. *Id.* at 1185.
76. Sherry, *supra* note 72.
77. Kelly v. Yale Univ., No. 3:01-CV-1591, 2003 WL 1653424, at *3–4 (D. Conn. Mar. 26, 2003).
78. *Id.* at *4.
79. Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438, 447 (D. Conn. 2006).
80. Takla v. Regents of the Univ. of Cal., No. 2:15-cv-04418-CAS(SHx), 2015 WL 6755190, at *5 (C.D. Cal. Nov. 2, 2015).
81. *Id.* at *4.
82. *Id.* at *5.
83. Karasek v. Regents of the Univ. of Cal. (*Karasek I*), No. 15-cv-03717-WHO, 2015 WL 8527338, at *1 (N.D. Cal. Dec. 11, 2015).
84. *Id.*

ence (1) after they reported their assaults and (2) to the general problem of sexual violence against its students.[85]

A. Karasek

Sofie Karasek was sexually assaulted on February 10, 2012, during a weekend trip to San Diego with the Cal Berkeley Democrats Club.[86] While sleeping in a bed with three other students, she awoke in the middle of the night to find another student, referred to in plaintiffs' complaint as "TH," massaging her legs, back, and buttocks.[87] Karasek stated that she froze and TH "continued to inappropriately rub her for approximately 30 minutes."[88]

In April 2012,[89] Karasek and three other students, who had also been sexually assaulted by TH, met with three representatives from the University's Title IX Office, Gender Equity Resource Center, and the Center for Student Conduct to report their assaults.[90] Even though Karasek was not informed at this meeting of the requirement to submit a written statement of the assault to initiate a formal investigation, Karasek submitted a formal complaint on May 15, 2012.[91]

Karasek was not contacted by the University for the next eight months.[92] The President of the Democrats Club did tell Karasek that "the administration had advised against removing TH from the Club because [the administration was] concerned that if [TH] went to another student group, he [could] assault someone and there would not be the same support structure for a survivor in that group."[93]

After being informed that TH was graduating in December 2012, Karasek emailed Christine Ambrosio with the Gender Equity Resource Center in November 2012 to request an update on her com-

85. *Id.* The court dismissed plaintiffs' claims based on this theory. The cases in support of this argument were distinguishable as they involved the schools having prior knowledge about specific facts or perpetrators. The plaintiffs do not allege the University had such knowledge here but rely on the University's underreporting of sexual violence and failure for many years to adequately respond to reports. Even though the University's response to the general problem of sexual violence was "lacking in certain respects," it is not enough to establish deliberate indifference. *Id.* at *10.

86. *Id.* at *1.

87. *Id.*

88. *Id.*

89. While Karasek initially stated the meeting was in April or May 2012, the third amended complaint clarified the meeting took place on April 20, 2012. Karasek v. Regents of the Univ. of Cal. (*Karasek II*), No. 15-cv-03717-WHO, 2016 WL 4036104, at *1 (N.D. Cal. July 28, 2016).

90. *Karasek I*, 2015 WL 8527338, at *1.

91. *Id.*

92. *Id.*

93. *Id.*

plaint.[94] Ambrosio did not respond.[95] Two weeks later, Karasek sent another email to Ambrosio.[96] Karasek was finally given information from the University for the first time on December 12, 2012.[97] She received a three-sentence email from the Title IX Office that stated the "matter had been explored and resolved using an early resolution process."[98] It did not state what the outcome was.[99] On December 17, 2012, three days after TH graduated, Karasek received an email stating the Center for Student Conduct found TH had violated the Campus Code of Student Conduct but did not state if there had been any disciplinary actions taken against him.[100] After filing a complaint against the University under the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act, Karasek was finally informed that TH had been placed on disciplinary probation and had undergone some counseling measures.[101]

B. Commins

Nicoletta Commins was sexually assaulted in January 2012 in her off-campus apartment by "John Doe 2."[102] Commins stated that John Doe 2 performed oral sex on her, attempted to force her to perform oral sex on him, and digitally penetrated her without her consent after she invited him to her apartment.[103] Commins reported the assault to the Berkeley Police Department the next day.[104] When the University contacted her, she was told the University's investigation could not begin until the Berkeley Police Department concluded its investigation.[105] Commins specifically requested to the Office of Student Conduct that the University begin its investigation immediately, but the University did not acknowledge this request.[106] At some point, the Office of Student Conduct contacted Commins and asked if she still wanted to pursue an investigation; Commins stated that she did.[107]

The University did not contact Commins again until March 2013 when she received an email from the Office of Student Conduct informing her that John Doe 2 had been suspended until Fall 2014.[108]

94. *Id.* at *2.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*; *see* 20 U.S.C. § 1092(f) (2012).
102. *Karasek I*, 2015 WL 8527338, at *2.
103. *Id.*
104. *Id.* at *3.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*

The email, however, was sent to an email Commins did not regularly check and had not used to correspond with the University previously, so she did not see it.[109] In July 2013, Commins contacted the Office of Student Conduct for an update and was informed that "John Doe 2 had been suspended, that he was required to complete a reflective writing requirement, that he had been prohibited from contacting her, and that he would be on disciplinary probation for the remainder of his time at the University."[110] Commins was not informed of her right to appeal any of the decisions.[111]

C. Butler

During the summer of 2012, Aryle Butler was working for the University as an assistant to Margot Higgins, a Ph.D. candidate conducting research in Alaska.[112] In Alaska, Butler lived in the Wrangell Mountains Center.[113] "John Doe" was on the Board of the Wrangell Center, was a guest lecturer, and was, therefore, on campus frequently during this time.[114] In June 2012, Butler was in the dining hall at the Wrangell Center when John Doe "approached her from behind, pressed her up against a table, and inserted his hands into her underwear and began massaging her genitals."[115] The next day, Butler reported the incident to Higgins, but did not name John Doe.[116] Higgins responded by asking if the assailant was John Doe.[117] Butler confirmed it was but requested Higgins not say anything at that time.[118]

Later in the summer, John Doe approached Butler in the library at the Wrangell Center.[119] He "moved her hair to one side and whispered into her ear, 'It's so nice to have such a beautiful woman around,'" patted her shoulder and then left.[120] Butler reported this incident to Higgins as well.[121] A third incident occurred later that summer when Butler was in the kitchen and John Doe approached her from behind, pressed her against a counter, and rubbed her breasts underneath her clothing.[122] Butler immediately reported this to Higgins, who was

109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at *4.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

away from the Wrangell Center at the time but advised her to stay in Higgins's private cabin.[123] At the end of the summer, Higgins told Butler that she had spoken with John Doe and she believed he "really gets it this time."[124]

Butler reported the assaults to Ambrosio with the Gender Equity Resource Center when she returned to the University, and Ambrosio organized a meeting between Butler and Oldham with the Title IX Office.[125] At the meeting, Oldham repeatedly asked Butler if she ever "affirmatively rebuffed any of John Doe's advances" and asked how he was "supposed to know his conduct was not welcome if she never affirmatively rebuffed him."[126] Oldham also warned Butler about the consequences of falsely reporting sexual assaults.[127]

IV. THE NORTHERN DISTRICT OF CALIFORNIA CORRECTLY INTERPRETED THE FURTHER HARASSMENT REQUIREMENT OF TITLE IX CASES

At the hearing on the University's motion to dismiss, the University argued that plaintiffs alleging a Title IX claim must have been subjected to further harassment after they reported their assaults to a school official for the school to be liable.[128] The University claimed there were "two avenues of causation" a plaintiff could allege under *Davis*: either the institution's conduct "directly caused the harassment" or the "institution indirectly caused the harassment by creating a vulnerability that allowed the harassment to take place."[129] The additional harassment supposedly required would be an "affirmative act of harassment by the original perpetrator or a similarly situated individual."[130] Since the plaintiffs did not suffer further harassment after reporting their assaults, according to the University, their Title IX claims must fail.[131]

The district court in *Karasek I*, however, rejected the University's arguments.[132] The court correctly concluded that the University's argument was flawed. The University's argument that a student must be subjected to further harassment in order for the school to be liable—no matter the deficiency of the school's response, the impact on the victim, or the circumstances of the case—was mistaken.[133] This

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at *10.
129. Reply for Defendant at 8, *Karasek I*, 2015 WL 8527338 (No. 15-cv-03717-WHO).
130. *Karasek I*, 2015 WL 8527338, at *10.
131. *Id.* at *13.
132. *Id.* at *12.
133. *Id.*

view "runs counter to the goals of Title IX", and the court refused to follow that logic.[134] Instead, the court followed the view set forth in *Kelly*, *Takla*, and *Derby* that further harassment can be met without additional contact between the perpetrator and victim.[135]

The court in *Karasek I*, however, still dismissed two of the three individual claims by plaintiffs. The court dismissed Karasek's Title IX claim for failing to adequately allege causation.[136] Even though she was not required to allege she suffered additional affirmative acts of sexual harassment, the court reasoned this did not mean Karasek did not have to show that the university made her liable or vulnerable to the harassment.[137] Even under *Williams*, a plaintiff must show something occurred after the school was put on notice of the harassment.[138] The cases Karasek relied upon that had similar facts were distinguishable from this case because the other plaintiffs made specific allegations connecting their harassment and their assailants. The plaintiffs in those cases took extreme measures to avoid seeing their perpetrators when the schools acted with deliberate indifference and failed to protect them, and they had fear and anxiety in response to the possibility of seeing their perpetrators, coupled with encounters with their perpetrators after reporting their assaults to the university.[139] In *Williams*, the plaintiff permanently withdrew from her university following her assault.[140] Even though Karasek did allege psychological and emotional damages following the assault, her allegations did not stem from the perpetrator being on campus.[141] She

134. *Id.*

135. *Id.* at *13; *see* Takla v. Regents of the Univ. of Cal., No. 2:15-cv-04418-CAS(SHx), 2015 WL 6755190, at *4 (C.D. Cal. Nov. 2, 2015); Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438, 444 (D. Conn. 2006); Kelly v. Yale Univ., No. 3:01-CV-1591, 2003 WL 1563424, at *3 (D. Conn. Mar. 26, 2003).

136. *Karasek I*, 2015 WL 8527338, at *14.

137. *Id.* (citing Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 644 (1999)).

138. Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282 (11th Cir. 2007) (plaintiff permanently withdrew the day after the assault), *superseded by statute on other grounds*, FED. R. CIV. P. 15(a) (amended 2009); *Karasek I*, 2015 WL 8527338, at *14; *Takla*, 2015 WL 6755190, at *2 (plaintiff feared going to campus and running into the perpetrator); *Derby Bd. of Educ.*, 451 F. Supp. 2d at 442 (plaintiff eventually transferred to a different school to avoid the chance of seeing the perpetrator); *Kelly*, 2003 WL 563424, at *2 (when the school ignored her requests for residential and academic accommodations, plaintiff eventually left out of fear for her safety).

139. *Karasek I*, 2015 WL 8527338, at *14; *see Takla*, 2015 WL 6755190; *Derby Bd. of Educ.*, 451 F. Supp. 2d 438.

140. *Williams*, 477 F.3d at 1289.

141. *Karasek I*, 2015 WL 8527338, at *15. The court dismissed Karasek's claim in the third amended complaint for not adequately pleading deliberate indifference, stating that while the University's failure to keep in regular contact with her and its use of an early resolution process was "a serious deficiency," it did not amount to deliberate indifference. Karasek v. Regents of the Univ. of Cal. (*Karasek II*), No. 15-cv-03717-WHO, 2016 WL 4036104, at *14 (N.D. Cal. July 28, 2016).

also did not allege that her "heightened sense of fear, anxiety, and stress" was in response to the fear of seeing her perpetrator on campus but instead stated it was in response to "knowing that there [were] possible perpetrators in her classes that have not been removed by the University."[142]

The court dismissed Commins's claim because she did not specifically state the amount of time that passed between her report and when the University initiated or completed its investigation.[143] As her claim of deliberate indifference was focused on the University's delay in beginning its investigation of her assailant, the court could not determine whether the University did act with deliberate indifference without a specific timeframe.[144]

The court allowed Butler's claim to move forward over the University's arguments that Butler's report failed to give the University actual knowledge or that the University did not have substantial control over the harasser.[145] The University did not rebut Butler's claim of deliberate indifference.[146]

Even though the Northern District of California dismissed two out of three claims, it allowed the plaintiffs to amend and refile their complaint.[147] Karasek and Commins filed their amended complaint with additional information in an attempt to cure its defects but were still unsuccessful.[148] The judge made it clear the University's actions were inexcusable but did not rise to the "exceedingly high" legal standard required by deliberate indifference.[149] The plaintiffs filed their fourth amended complaint on September 1, 2016, and the University responded with another motion to dismiss.[150] On December 22, 2016, for the first time, the court dismissed Karasek and Commins's claims

142. *Karasek I*, 2015 WL 8527338, at *15.
143. *Id.*
144. *Id.*
145. *Id.* at *16
146. *Id.*
147. *Id.* at *15–16.
148. Karasek v. Regents of the Univ. of Cal. (*Karasek II*), No. 15-cv-03717-WHO, 2016 WL 4036104, at *15, *17 (N.D. Cal. July 28, 2016).
149. *Id.* at *1 ("I agree with plaintiffs that the University bungled its responses to their assaults. The University's failure to communicate with plaintiffs in a meaningful way prior to making its disciplinary decisions is a glaring deficiency in the University's process. As this Order outlines, there are others. And one wonders what it takes to get expelled from the University if a conviction for felony assault of a fellow student is not enough. But all of that said, the deliberate indifference standard under *Davis* protects school administrations that do investigate and remedy complaints, and judges are not permitted to substitute their views for those of not clearly unreasonable administrators.").
150. Order on Defendant's Motion to Dismiss the Fourth Amended Complaint, *Karasek I*, 2015 WL 8527338 (No. 15-cv-03717-WHO), https://cases.justia.com/federal/district-courts/california/candce/3:2015cv03717/290311/96/0.pdf?ts=1482482401 [https://perma.unl.edu/8GAU-YZ67].

without leave to amend.[151] Butler's claim, however, survived the University's motions. The University filed its answer to her complaint on January 11, 2017.[152]

The purpose of Title IX is to prohibit discrimination on the basis of sex in any education program receiving federal funding. As the District Court for the Northern District of California correctly noted, requiring additional acts of harassment by the perpetrator or a similarly situated individual against the survivor would frustrate the purpose of Title IX. Requiring a survivor to be subjected to additional acts of harassment after filing a complaint with a university effectively punishes a survivor who takes steps to avoid a situation where he or she would be harassed.

What started out as a causation requirement to ensure universities were not held vicariously liable for every act of harassment on the basis of sex has transformed into a shield for universities from liability no matter how egregious their actions are in response to a sexual assault claim. The requirement of further harassment alleviates any duty on the university to properly address and respond to a survivor's complaint. Under this view, a university could ignore a survivor's complaint and, so long as the perpetrator did not harass the survivor again, the university could not be held liable.

Frazer is an extreme example of what courts require when they follow the view that necessitates additional acts of affirmative harassment to satisfy further harassment.[153] While some courts requiring affirmative acts of further harassment would most likely deem the actions of the assailant in *Frazer* to be sufficient further harassment, the outcome of this case illustrates how courts are circumventing the purpose and intent behind Title IX.

The District Court for the Northern District of California correctly concluded that a Title IX claim can be successful without harassment taking place after the survivor notifies the university. This does not mean that a university can be held strictly liable for any sexual assaults that are committed by its students. It merely recognizes there are numerous ways a university can subject a student to further discrimination during an investigation, or lack thereof, that could make it liable under Title IX.

151. *Id.*
152. Defendant's Answer to the Fourth Amended Complaint, *Karasek I*, 2015 WL 8527338 (No. 15-cv-03717-WHO).
153. Frazer v. Temple Univ., 25 F. Supp. 3d 598 (E.D. Pa. 2014).

V. THE DEAR COLLEAGUE LETTER AS AN APPROPRIATE FUTURE REQUIREMENT

On April 4, 2011, the Department of Education Office for Civil Rights (OCR) promulgated a Dear Colleague Letter (DCL) on sexual harassment for judicial notice.[154] The DCL consisted of a set of guidelines to assist survivors, the accused, and universities in navigating the Title IX procedures.[155] Then-Vice President Joe Biden drafted the letter and launched the "It's On Us" awareness campaign in 2014 to put an end to sexual assault on college campuses.[156] The DCL was motivated by "deeply troubling" statistics of sexual violence on college campuses and was directed at "ensuring that all students feel safe in their school, so that they have the opportunity to benefit fully from the school's programs and activities."[157] The DCL discusses Title IX and "schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence."[158] The DCL stated that once a school has notice, or reasonably should have notice about harassment, "Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects."[159] Further, school employees must be adequately trained to report harassment to the appropriate school officials, who can respond to the incident properly.[160] The DCL also requires the school's investigation of the harassment be "prompt, thorough, and impartial."[161] The DCL specifically laid out certain grievance procedures that are "critical to achieve compliance with Title IX":[162] schools must (1) give notice to students of the grievance procedures, including where complaints may be filed; (2) conduct an "[a]dequate, reliable, and impar-

154. Letter from Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Title IX Coordinators 1 (Apr. 4, 2011) [hereinafter Dear Colleague Letter], http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [http://perma.unl.edu/RT2F-JLPY]. The DCL does not impose additional requirements to the current law but "provides information and examples to inform recipients about how the OCR evaluates whether covered entities are complying with their legal obligations." *Id.* at 1 n.1.

155. Press Release, U.S. Dep't of Educ., Vice President Biden Announces New Administration Effort to Help Nation's Schools Address Sexual Violence (April 4, 2011), https://www.ed.gov/news/press-releases/vice-president-biden-announces-new-administration-effort-help-nations-schools-ad [http://perma.unl.edu/XC27-3LQE].

156. Tanya Somander, *President Obama Launches the "It's On Us" Campaign to End Sexual Assault on Campus*, OBAMA WHITE HOUSE (Sept. 19, 2014), https://obamawhitehouse.archives.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus [http://perma.unl.edu/YRP6-AM84].

157. Dear Colleague Letter, *supra* note 154, at 2.

158. *Id.*

159. *Id.* at 4.

160. *Id.*

161. *Id.* at 5. Also, mediation is never an appropriate resolution in sexual assault cases.

162. *Id.* at 9. These requirements are listed in no particular order.

tial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence"; (3) have "[d]esignated and reasonably prompt time frames for the major stages of the complaint process"; (4) provide notice to the parties of the outcome of the complaint; and (5) provide assurances that the school will take steps to prevent the recurrence of any harassment and to correct its discriminatory effects.[163]

The DCL also requires schools use a preponderance of the evidence standard—a "more likely than not standard."[164] The DCL based this determination on the history of using the preponderance of the evidence standard in all discrimination claims under statutes enforced by the Office of Civil Rights.[165] Using the same standard of proof in all violations of civil rights laws provides for equitable resolutions.[166]

The plaintiffs in *Karasek I* argued the guidelines and procedures set forth in the DCL apply to prove the University's deliberate indifference.[167] But, as the court stated, the DCL specifically states its requirements are "the standard for administrative enforcements of Title IX and in court cases where plaintiffs are seeking injunctive relief" and does not set forth the "standard in private lawsuits for monetary damages,"[168] which remains deliberate indifference. The court further reasoned that the guidance provided by the DCL was broader than the "actual knowledge" standard under *Davis*.[169] Under the guidelines in the DCL, a school is obligated to take action if it "knows or reasonably should know,"[170] while under *Davis*, a school can only be liable if it has actual knowledge.[171] Further, under the DCL, a school must address "harassment that creates a hostile environment";[172] however, under *Davis*, a school is only liable for harassment that is so severe, pervasive, and objectionably offensive that it deprived the student "of access to the education opportunities or benefits provided by the school."[173]

A recent case before the District Court for the Western District of Virginia saw another attempt at this argument by a plaintiff but was

163. *Id.*
164. *Id.* at 11.
165. *Id.*
166. *Id.*
167. Karasek v. Regents of the Univ. of Cal. (*Karasek I*), No. 15-cv-03717-WHO, 2015 WL 8527338, at *39 (N.D. Cal. Dec. 11, 2015).
168. Dear Colleague Letter, *supra* note 154, at 4 n.12.
169. *Karasek I*, 2015 WL 8527338, at *39 (comparing "knows or reasonably should know about . . . harassment" language in the DCL to "actual knowledge" required under *Davis*).
170. Dear Colleague Letter, *supra* note 154, at 4.
171. *Karasek I*, 2015 WL 8527338, at *13.
172. Dear Colleague Letter, *supra* note 154, at 4.
173. *Karasek I*, 2015 WL 8527338, at *13.

also unsuccessful.[174] Although the court did acknowledge that other cases have used the DCL as a factor[175] or a significant guidance document to give weight to the determination of whether the school acted with deliberate indifference,[176] the court refused to consider the DCL in its analysis.[177]

Conversely, alleged perpetrators have brought claims asserting that because of the publicity sexual assault cases have recently received, they have been victims of sex discrimination under Title IX. A male student at Columbia University recently brought a Title IX claim addressing the "backlash [the University] confronted because its treatment of men accused of sexual assault was perceived by some to be too lenient."[178] He alleged the University was therefore motivated to counteract the negative publicity by "accept[ing] the female's accusation of sexual assault and reject[ing] the male's claim of consent, so as to show the student body and the public that the University is serious about protecting female students from sexual assault."[179] The Second Circuit Court of Appeals allowed the plaintiff's complaint to go forward and overruled the University's motion to dismiss in July 2016.[180] As this case has not yet been resolved, the stance the Second Circuit will take on this use of Title IX can only be speculated to. While the plaintiff's argument may have merit, it could be difficult to decipher the University's motivations. Whether the University unfairly ruled against the plaintiff on a baseless claim by the female student or the University's ruling illustrates its enhanced approach to

174. Butters v. James Madison Univ., 208 F. Supp. 3d 745, 757 (W.D. Va. 2016).

175. *Id.* at 758; *see* Doe v. Forest Hills Sch. Dist., No. 1:13-cv-428, 2015 WL 9906260, at *10 (W.D. Mich. Mar. 31, 2015) ("Although failure to comply with Title IX guidance does not, *on its own*, constitute deliberate indifference, it is one consideration."); Bleiler v. Coll. of the Holy Cross, No. 11-cv-11541, 2013 WL 4714340, at *5 (D. Mass. Aug. 26, 2013) (noting that the guidance in the DCL "does not have independent force of law but informs this Court's evaluation of whether the College's procedures were 'equitable'"); *see also* Ross v. Univ. of Tulsa, 180 F. Supp. 3d 951, 969 (N.D. Okla. 2016) (concluding that failure to adhere to the best practices or the guidance set forth by the DCL does not necessarily mean the University's response amounted to deliberate indifference), *aff'd*, 859 F.3d 1280 (10th Cir. 2017).

176. *See* Yu v. Vassar Coll., 97 F. Supp. 3d 448, 462 & n.7, 465 (S.D.N.Y. 2015) (citing to the DCL as a "significant guidance document" and using it to evaluate a college's disciplinary proceedings).

177. *Butters*, 208 F. Supp. 3d at 757–58; *see also* Moore v. Regents of the Univ. of Cal., No. 15-cv-05779-RS, 2016 WL 2961984, at *5 (N.D. Cal. Dec. 5, 2016) (rejecting plaintiff's "misguided" argument that the court should defer to the DCL in deciding whether a university's actions amount to deliberate indifference).

178. Doe v. Columbia Univ., 101 F. Supp. 3d 356, 360 (S.D.N.Y. 2015), *vacated*, 831 F.3d 46 (2d Cir. 2016) (concluding the male student adequately pleaded facts that plausibly supported at least minimal inference of sex bias by the university and, therefore, vacated and remanded the district court's dismissal).

179. *Columbia Univ.*, 831 F.3d at 57–58.

180. *Id.* at 59.

combat the seriousness of sexual violence can only be determined by reviewing the University's investigation. Undoubtedly, universities finding alleged perpetrators guilty of any accused sexual violence irrespective of the evidence is not the appropriate solution.

On September 22, 2017, however, current Education Secretary Betsy DeVos rescinded the DCL.[181] Secretary Devos claimed that the guidelines went "too far and created a system that treated the accused [students] unfairly."[182] Secretary Devos's main criticism of the DCL was its requirement that universities use the preponderance of the evidence standard and argues that it should be raised to a clear and convincing evidence standard.[183] Secretary DeVos has previously emphasized the need for due process for those "wrongly accused of assault" and whose voices are often silenced.[184] While the Trump Administration has not yet enacted new rules to replace the DCL, there has been concern about the changes to come from the controversial Administration that has been criticized for its approach to and comments about sexual assaults on college campuses.[185]

Although arguments are made to the contrary,[186] the DCL proposes a praiseworthy standard to which universities should be held. Requiring universities to adhere to the procedures outlined in the DCL would ensure consistent, adequate responses by university administrators and result in safer campuses nationally.

The inconsistent interpretations as to requirements in a Title IX sexual harassment claim against a university illustrate the need for a

181. Stephanie Saul, *Betsy DeVos Reverses Obama-Era Policy on Campus Sexual Assault Investigations*, N.Y. TIMES, Sept. 23, 2017, at A1, https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html.

182. *Id.*

183. *Id.*

184. Susan Svrluga & Emma Brown, *DeVos Decries "Failed System" on Campus Sexual Assault, Vows to Replace It*, WASH. POST (Sept. 7, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/protesters-gather-anticipating-devos-speech-on-campus-sexual-assault/?utm_term=.fc14250e91c1 [https://perma.unl.edu/LL29-HYNU].

185. For example, in July 2017, the Education Department's Office for Civil Rights head received backlash and later apologized for stating that ninety percent of sexual assault accusations on college campuses "fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'" Katie Reilly, *Education Dept. Civil Rights Head: 90% of Campus Sexual Assaults Amount to "We Were Both Drunk*," TIME (July 13, 2017), http://time.com/4855492/betsy-devos-candice-jackson-campus-sexual-assault-accusations [https://perma.unl.edu/RAY4-Y8MS].

186. *See* Tamara Rice Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter*, 64 U. KAN. L. REV. 915, 943 (2016) (arguing the DCL is an invalid legislative rule which denies alleged perpetrators due process and is effectively shaming universities into compliance by publishing names of schools under investigation).

uniform approach. A uniform approach to Title IX claims would not only provide for consistency in its application in federal courts but would provide consistent responses by universities to student reports of sexual harassment. Having clear requirements explicitly set out for responding to student reports would provide universities with information on how to adequately address such reports. The inadequate responses presently occurring show universities either do not have the knowledge to enact proper procedures for responding to sexual harassment claims or do not prioritize it highly enough to do it on their own. Currently, administrators and investigators that handle Title IX proceedings are not required to have any training on how to interview sexual assault survivors.[187] This is one of the reasons many investigations or responses are often deficient. When administrators do not have proper training on responding to victims of trauma, Title IX investigations can result in inaccurate or inconsistent victim statements.[188] This often leads to obstacles in prosecutions of Title IX claims. Requiring universities to follow the procedures set forth in the DCL, such as mandating proper training for Title IX administrators, would ensure consistent, adequate responses by universities and result in safer campuses nationwide.

Mandating universities adhere to the DCL's guidelines would also allow courts to easily review a university's response to complaints. The DCL, for example, states that although the length of time required to investigate a complaint will vary depending on the complexity of the investigation, a "typical investigation takes approximately 60 calendar days."[189] Firm guidelines such as this would allow a reviewing court to easily determine the appropriateness and sufficiency of a university's investigation.

The prevalence of sexual assault on college campuses demands a response not merely to reflect an *image* that universities are serious about protecting their students but that universities actually are serious. A university's aim should not be to act with the minimum standard required to avoid liability but to take steps to create a safe environment for its students. The Clery Act[190] was a substantial step forward in protecting college students from sexual violence by arming them with knowledge. But an additional step is needed to further pro-

187. *See* Sara F. Dudley, Comment, *Paved with Good Intentions: Title IX Campus Sexual Assault Proceedings and the Creation of Admissible Victim Statements*, 46 GOLDEN GATE U. L. REV. 117, 118 (2016).

188. *Id.* (stating sexual assault survivors may falsify information when interviewed due to the sensitive nature of the crime).

189. Dear Colleague Letter, *supra* note 154, at 12.

190. The Clery Act (formerly the Crime Awareness and Campus Security Act) was passed in 1990 after the rape and murder of Jeanne Clery in her Lehigh University dorm room. This Act required colleges to disclose crime statistics on and near their campuses. Schroeder, *supra* note 8, at 1212.

tect students and ensure a university's response to sexual harassment claims is adequate.

Many scholars have criticized the DCL and the administrative adjudication of campus sexual assault.[191] They argue that universities are not competent to adjudicate these claims and that these investigations do not afford due process rights to the accused.[192] They argue that the criminal justice system should be the sole vehicle for prosecuting sexual violence claims. Further, they argue the preponderance of the evidence standard unfairly punishes the accused since it is a lower standard than the criminal standard of beyond a reasonable doubt.

Administrative adjudication, however, is a necessary practice for campus sexual assault survivors for many reasons other than the legal obligation imposed by Title IX. First, the criminal justice system often fails survivors of sexual assault.[193] Second, even when sexual assaults are reported, a majority of the cases are not charged.[194] Providing an additional avenue for victims to seek redress encourages reporting of sexual violence in the face of a criminal justice system that is widely unsuccessful. In the rare occurrence that a sexual assault case is prosecuted and brought to trial, only fourteen to eighteen percent result in a conviction.[195]

Not only does administrative adjudication encourage reporting, it also provides another tool to ensure students are held accountable for their conduct. By doing this, campus safety is increased. This is so even though it is argued that the punishment imposed on students by universities is not effective since even under the best case scenario when a student is expelled, the student is still in society and can continue to perpetrate sexual violence. While this may be accurate, the same rings true when the student is not expelled. However, expelling or otherwise disciplining a student perpetrator conveys that sexual violence is not condoned and will not be tolerated by universities.

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191. *See generally* Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES, Nov. 16, 2014, at SR1, http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html?_r=0.

192. *Id.*; *see also* Harris, *supra* note 7 (arguing that the criminal justice system should be solely responsible for the handling of campus sexual assault cases because universities are denying perpetrators due process, and since all a university is able to do is expel the perpetrators, it is simply releasing them back into society).

193. *See* Michelle J. Anderson, Feature, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1959–62 (2016).

194. One recent study found that only 9.7% of cases sampled resulted in charges. Megan A. Alderden & Sarah E. Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 525, 525, 540 (2012). There is often not enough evidence to proceed with criminal charges. *Id.*

195. Rider-Milkovich, *supra* note 8.

Lastly, the preponderance of the evidence standard is properly used in Title IX sexual assault investigations. The university officials are not deciding whether the accused is being sent to jail, punished criminally, or denied liberty. The beyond a reasonable doubt standard is a burden of proof reserved only for criminal trials. In Title IX investigations, the university officials are only determining whether the accused has violated school policies. The accused in Title IX investigations are still afforded notice of the accusations and the right to hearing. The preponderance of the evidence standard is therefore appropriate in Title IX investigations.

VI. CONCLUSION

The District Court for the Northern District of California sets an important precedent in recognizing that it is against Title IX's purpose to require multiple acts of harassment by the perpetrator in order for a University to be liable, no matter what the university's response or lack thereof. It correctly points out that this requirement directly contradicts the purpose behind Title IX. Although this precedent is a significant step toward providing more adequate protection and responses to campus sexual violence, the DCL would further this goal.

Sexual violence on college campuses is a pervasive problem. Students are not reporting sexual assaults out of fear that their university will not provide them with justice. Further, this fear is not unsubstantiated. The fact that students are rarely expelled for sexual misconduct but regularly expelled for honor-code violations such as cheating illustrates how universities prioritize their students' safety. Student victims of sexual assault are twelve percent more likely than nonstudent victims not to report the incident.[196] The reasons for not reporting instances of sexual assault on campuses range from the lack of a confidential reporting system to fearing that the perpetrator will not be "sufficiently punished by the academic institution or criminal justice system."[197] Even though universities are avoiding liability under Title IX by responding to a claim, these minimal responses are still not sufficient. A universal standard that explicitly outlines requirements for responding to and handling sexual violence reports would promote equitable procedures and resolutions by giving universities the tools necessary to combat this serious problem.

While the future remains uncertain with the forthcoming changes to Title IX and campus sexual assault enforcement by the Trump administration, our nation's colleges need to reaffirm to survivors that their safety is essential and will be protected. Absent a national policy

196. DeMatteo et al., *supra* note 16, at 228.
197. *Id.*

advocating for survivors of sexual assault, the campaign will be left to individual members of society to stand up for survivor voices. As Joe Biden reflected after the Department of Education's announcement on September 7, 2017, rescinding the DCL is a grim misstep:

> Today's announcement . . . is a step in the wrong direction. The truth is, although people don't want to talk about the brutal reality of sexual assault, especially when it occurs in our most cherished institutions, it is our reality, and it must be faced head-on. And any change that weakens Title IX protections will be devastating.
>
> Sexual assault is the ultimate abuse of power, and its pernicious presence in our schools is unacceptable. Policies that do not treat this epidemic with the utmost seriousness are an insult to the lives it has damaged and the survivors who have worked so hard to make positive change. And sexual assault has lasting effects on survivors: as many as one-third of rape victims may develop post-traumatic stress disorder, and even more experience other long-term physical and mental health effects. It is a life-altering tragedy.
>
> I'm asking everyone who has a stake in this fight to step up. Students, parents, faculty, alumni. Don't just sit and watch. Speak up. Any rollback of Title IX protections will hurt your classmates, your students, your friends, your sisters. Make your views known. . . . Keep fighting. Tell this administration that we refuse to go backwards.[198]

198. Biden, *supra* note 1.